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No. 91-1038

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ALPHA LYRACOM SPACE COMMUNICATIONS, INC., and REYNOLD V. ANSELMO d/b/a PAN AMERICAN SATELLITE,
Petitioners,

v.

COMMUNICATIONS SATELLITE CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether international executive agreements to which the United States is a party, together with the Communications Satellite Act of 1962 and the Executive Branch's pervasive control over respondent, confer express as well as implied immunity upon respondent with respect to its activities as the official United States representative and Signatory to INTELSAT.*

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* While the United States Court of Appeals for the Second Circuit affirmed the district court's dismissal of petitioners' complaint on the ground that respondent COMSAT was immune from suit with respect to its activities as the United States representative and Signatory to INTELSAT, the Court reversed and remanded to permit the filing of an amended complaint alleging non-immune conduct. Following this reversal and remand, petitioners, on November 13, 1991, filed a second amended complaint which is now pending in the United States District Court for the Southern District of New York. The second amended complaint contains many of the same allegations and seeks precisely the same relief and damages as the original complaint. Unless otherwise indicated, all references to "petitioners' complaint" in this brief are to the complaint considered by the district court and court of appeals in connection with respondent's original motion to dismiss, not the second amended complaint currently pending in the district court.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioners Alpha Lyracom Space Communications, Inc. and Reynold V. Anselmo d/b/a Pan American Satellite, and the respondent, Communications Satellite Corporation.**

** Pursuant to Rule 29.1 of this Court, Communications Satellite Corporation ("COMSAT") states that it has a partial interest in Mobile Telesystems, Inc. and Anadigics, Inc. COMSAT has no parent company or partially-owned subsidiaries.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. A1-15) is reported at 946 F.2d 168 (1991). The opinion of the United States District Court for the Southern District of New York (Pet. App. B1-22) is reported at 1990-2 Trade Cas. (CCH) ¶ 69,188 (1990).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition at 2.

STATUTES INVOLVED

In addition to those set forth in the Petition at 3, the following statutes, treaties and regulations are involved

in this case and are set forth in Respondent's Appendix ("Res. App."):[1]

U.S. General Assembly Res. 1721, 1 U.N. GAOR Supp. (No. 17), U.N. Doc. A/5100 (1962) (Res. App. 1a)

Executive Order No. 11,966, 3 C.F.R. 158 (1978) (Res. App. 6a)

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Procedures for U.S. Government Instruction of the Communications Satellite Corporation in its Role as the U.S. Representative to the Interim Communications Satellite Committee, *reprinted in COMSAT Study*, 77 F.C.C. 2d 564 (1980) (Res. App. 19a)

Memorandum of Understanding, signed by Departments of State and Commerce, the FCC and COMSAT (Sept. 28, 1984) (Res. App. 23a)

Letter from Secretary of State George P. Schultz and Secretary of Commerce Malcolm Baldrige to Mark S. Fowler, Chairman of the FCC (Nov. 28, 1984), *reprinted in* 3 C.F.R. 254 (1985) (Res. App. 27a)

Foreign Relations Authorization Act, Fiscal Years 1986 and 1987 ("FRAA"), Pub.L.No. 99-93, 99 Stat. 405 (1985) (Res. App. 29a)

In re Establishment of Satellite Systems Providing International Communications, FCC Docket No. 84-1299 (July 25, 1985) (Selected Excerpts) (Res. App. 33a)

[1] The materials contained in Respondent's Appendix appear in the Joint Appendix in the Court of Appeals and are included herein for the convenience of the Court. Hereafter all references to Respondent's Appendix will be to "Res. App."; all references to Petitioners' Appendix will be to "Pet. App.".

COUNTER-STATEMENT OF THE CASE

Respondent Communications Satellite Corporation ("COMSAT") is the statutorily-designated representative and Signatory to the International Telecommunications Satellite Organization ("INTELSAT"). For more than 25 years, INTELSAT has served as the international organization through which the United States and other member-nations have organized and operated a global satellite telecommunications system.

Petitioners' complaint alleges that actions and decisions of INTELSAT, agreed to by its member-nations (including the United States) and their official representatives (including COMSAT), hampered petitioners' ability to provide international satellite communications services in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1988), and state common law. Petitioners allege a conspiracy among INTELSAT, its member-nations and their official representatives known as "Signatories." (Complaint, ¶ 27, 28; Pet. App. C17-27.)[2] Thus, although COMSAT is the sole defendant named in petitioners' complaint, this lawsuit is a direct challenge to the INTELSAT system and its decisions, taken collectively by its member-nations with respect to private international satellite systems, such as petitioners'.

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[2] The acts said to be in furtherance of the alleged conspiracy involve:

(i) INTELSAT resolutions passed by its constituent assemblies (§§ 28(d), (k)-(n), (p)-(r), (t), (x));

(ii) INTELSAT decisions on pricing, procurement and deployment of satellite capacity, as well as INTELSAT personnel decisions (§§ 28(g), (h), (w), (x));

(iii) INTELSAT consultations on separate international satellite systems (§§ 28(b)-(f), (h)-(t)); and

(iv) INTELSAT consultations on separate satellite systems providing foreign domestic services and decisions by foreign nations with respect to the granting of operating agreements (§§ 28(f), (i)-(n), (p)-(t), (y)). (Pet. App. at C19-27).

Our government is committed by treaty to the INTELSAT global satellite system and to the consultation process established by international agreement in order to preserve that system. It is through INTELSAT, as well as through respondent COMSAT as the United States representative and Signatory to INTELSAT, that our government implements its foreign policy in the field of international satellite communications.

The international agreements which govern the operation of this global satellite system contain immunity provisions applicable to the actions and decisions of INTELSAT, its member-nations and their representatives and Signatories, including respondent. Accordingly, as both the district court and Second Circuit held, the complaint is not a permissible means by which petitioners may challenge the actions and decisions of INTELSAT or the conduct of respondent as the United States representative to INTELSAT.

Petitioners' complaint nevertheless seeks to undermine INTELSAT, to prevent our government from fulfilling its treaty obligations, and to frustrate United States policy to foster and support the INTELSAT global satellite system.[3] In almost every instance, petitioners' complaint challenges alleged conduct by respondent in its role as the United States representative or Signatory to INTELSAT,[4] or conduct that is alleged to be unlawful because it is dependent upon or intertwined with conduct by respondent in its role as Signatory.[5]

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[3] The district court recognized that petitioners' complaint is a frontal attack on INTELSAT, its sovereign member-nations and their official representatives (including COMSAT). As the district court found, conduct of INTELSAT and its member nations "permeates the allegations even under the most liberal reading of the complaint." (Pet. App. at B20-21).

[4] *E.g.*, Complaint §§ 28(b)-(e), (g)-(h), (j)-(n), (p)-(r), (t), (w), (x). (Pet. App. at C18-27).

[5] *E.g.*, Complaint §§ 28(f), (i), (o), (s), (y). (Pet. App. C19-27).

Formation and Role of INTELSAT and COMSAT

Since the advent of the space age, the nations of the world have agreed that "the exploration and use of outer space should be only for the betterment of mankind and to the benefit of States irrespective of the stage of their economic or scientific development." U.N. General Assembly Res. 1721, 1 U.N. GAOR Supp. (No. 17) at 6, U.N. Doc. A/5100 (1962) (Res. App. at 1a). In recognition of this resolution, Congress enacted the Communications Satellite Act of 1962 ("CSA"), 47 U.S.C. §§ 701 *et seq.* (1982 and Supp. V 1987). (Pet. App. at D2-23). The declared policy of the CSA was "to establish, in conjunction and in cooperation with other countries," a communications satellite system "which will be responsive to public needs and national objectives, which will serve the communications needs of the United States and other countries, and which will contribute to world peace and understanding." § 701(a).

The CSA created COMSAT, respondent herein, as the only designated United States participant in the global system, subject to governmental regulation. § 701(c). *See COMSAT v. FCC*, 836 F.2d 623, 625 (D.C. Cir. 1988). In that role, the CSA required and authorized respondent to "plan, initiate, construct, own, manage and operate" the global satellite communication system in conjunction with foreign governments. Thus, respondent is a unique entity created by Congress for the very purpose of serving, in its role as Signatory to INTELSAT, as our government's representative in carrying out United States foreign policy in the field of international satellite communications. § 735(a)(1).

Pursuant to the CSA, the United States joined with other nations in 1964 to form INTELSAT, a not-for-profit international organization headquartered in Washington, D.C. Its mission was to establish a global satellite communications system providing expanded worldwide telecommunications services. Today, INTELSAT has 121 member-nations and its satellites provide international

telecommunications services to more than 170 countries, territories and dependencies as well as domestic telecommunications services to more than 40 nations. INTELSAT has been acclaimed as "a triumph of U.S. foreign policy." National Telecommunications and Information Administration, Report to Congress, *Long Range Goals In International Telecommunications and Information*, S. Prt. 98-22, 98th Cong., 1st Sess. 114 (1983). The functions and authority of INTELSAT, and the rights and obligations of its member-nations, including the United States, and their official representatives, including COMSAT, are prescribed by international executive agreements, known as the "Definitive Agreement" (Pet. App. at D111-190), the "Operating Agreement" (Pet. App. at D191-226), and the "Headquarters Agreement" (Pet. App. at D227-234).[6]

Article XIV of the Definitive Agreement sets forth procedures, known as the consultation process, that must be followed in the event that any member-nation desires to establish separate, non-INTELSAT, international or domestic satellite communications facilities. The purpose of this consultation process is to assure that any separate satellite system is compatible with INTELSAT's system and its global mission.[7] With regard to *international*

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[6] INTELSAT's organizational structure consists of an Assembly of Parties, comprised of the 121 member-nations, which sets the "general policy and long-term objectives of INTELSAT . . . ." (Definitive Agreement, Art. VII(c)(i)); a Meeting of Signatories in which each member-nation is represented by "a telecommunications entity, public or private" as its official "Signatory" (*id.* at Art. II(b)); and a Board of Governors comprised of 29 Signatories which is responsible for the oversight of INTELSAT in accordance with the Definitive and Operating Agreements and the policy determinations of the member-nations sitting as the Assembly of Parties. *Id.* at Art. I, X(a). The Board of Governors advises the Assembly of Parties on proposals for separate systems such as petitioners'. *Id.* at Art. XIV(c), (d).

[7] Since international systems (such as petitioners') implicate the foreign relations of INTELSAT's member-nations, the member-nations themselves, sitting as the Assembly of Parties, have the re-

satellite communications (*i.e.*, between two or more nations), Article XIV(d) requires that *prior* to the establishment, acquisition or utilization of non-INTELSAT facilities to meet a nation's international communications service requirements, the proposing nation shall:

> furnish all relevant information to and *shall consult with the Assembly of Parties, through the Board of Governors*, to ensure technical compatibility of such facilities and their operation with the use of the radio frequency spectrum and orbital space by the existing or planned INTELSAT space segment and to avoid significant economic harm to the global system of INTELSAT. *Upon such consultation, the Assembly of Parties*, taking into account the advice of the Board of Governors, *shall express, in the form of recommendations, its findings regarding the considerations set out in this paragraph*, and further regarding the assurance that the provision or utilization of such facilities shall not prejudice the establishment of direct telecommunication links through the INTELSAT space segment among all the participants.

(Pet. App. D151-152) (emphasis added).[8]

The INTELSAT agreements also contain express immunity provisions applicable to INTELSAT, its member-nations and their Signatories. Article XV(c) of the Definitive Agreement requires each member-nation to grant appropriate privileges, exemptions and immunities to INTELSAT, to its member-nations and *to Signatories*, with respect to the performance of their functions and

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sponsibility and authority to oversee the consultation process and to issue, by a two-thirds majority, the requisite findings on technical compatibility and economic harm. Definitive Agreement, Art. VIII(e), XIV(e).

[8] Article XIV(c) of the Definitive Agreement mandates a similar procedure for technical consultation of non-INTELSAT facilities which are to be used to provide domestic telecommunications services.

duties. Article XV(c) committed the United States, as the Party in whose territory the INTELSAT headquarters is located, to conclude a Headquarters Agreement granting "the appropriate privileges, exemptions and immunities to INTELSAT, to its officers, and to those categories of its employees specified in [the] . . . Headquarters Agreement, *to Parties and representatives of Parties, to Signatories and Representatives of Signatories . . . .*" (Pet. App. at D153) (emphasis added). Pursuant to this directive, the United States provided in paragraph 16 of the Headquarters Agreement that the:

> officers and employees of INTELSAT, *the representatives of the Parties and of the Signatories . . . shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions, ...*

(Pet. App. at D232) (emphasis added).

Pervasive Control and Supervision of Respondent As the United States Signatory to INTELSAT

Since its inception, respondent, as the United States Signatory to INTELSAT, has been subject to extensive supervision and direction by the Executive Branch "to assure that [COMSAT's relations with foreign governments and international organizations] shall be consistent with the national interest and foreign policy of the United States." 47 U.S.C. § 721(a)(4) (Pet. App. at D6-7).[9]

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[9] Pursuant to the CSA, the President appoints three members of COMSAT's Board of Directors, with the advice and consent of the Senate. 47 U.S.C. § 733(a) (Pet. App. at D13). The CSA also assigns to the National Aeronautics and Space Administration ("NASA") and the Federal Communications Commission ("FCC") additional supervisory and regulatory roles over COMSAT's activities. 47 U.S.C. at § 721(b), (c) (Pet. App. at D7-11). Among the responsibilities assigned to the FCC is ratemaking authority over COMSAT with respect to charges for INTELSAT services. 47 U.S.C. at § 721(c)(5) (Pet. App. at D10). The CSA also requires that COMSAT obtain permission from the FCC in order to partici-

Pursuant to these directives, the President issued Executive Order No. 12,046 which mandates that "[w]ith respect to telecommunications, the Secretary of State shall exercise primary authority for the conduct of foreign policy, including the determination of United States positions and the conduct of United States participation in negotiations with foreign governments and international bodies." Executive Order No. 12,046, 3 C.F.R. 158, § 5-201 (1978) (Res. App. 14a-15a) (emphasis added). The Secretary of State has been expressly invested with the responsibility of "*instructing [COMSAT] in its role as the designated United States representative to [INTELSAT]*" *and for "direct[ing] the foreign relations of the United States with respect to actions under the Communications Satellite Act of 1962. . . ."* *Id.* at § 5-202(a) (Res. App. at 15a) (emphasis added). *See also* Executive order No. 11, 191, 3 C.F.R. 273 (1966) (Res. App. 16a-18a).[10]

The instructional process through which the Secretary of State directs COMSAT's participation in INTELSAT is formalized in written procedures. *See* Procedures for U.S. Government Instruction of the Communications Satellite Corporation in its Role as U.S. Representative to the Interim Communications Satellite Committee, *reprinted in COMSAT Study*, 77 F.C.C.2d 564 (1980) (Res. App. at 19a-22a). Those procedures provide that in its role as United States representative to INTELSAT, "[re-

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pate in INTELSAT procurement programs or to provide services via INTELSAT satellites. 47 U.S.C. § 721(c)(7) (Pet. App. at D10-11). The President, respondent and the FCC are required annually to report to Congress on the activities and accomplishments of respondent. 47 U.S.C. § 744 (Pet. App. at D23).

[10] The President also directed the Secretary of Commerce to conduct a "continuous review" of the satellite communications system, including the activities of COMSAT, and to coordinate governmental activity to ensure "that there is full and effective compliance at all times with the policies set forth" in the CSA. Executive Order No. 12,046, § 2-301(b), (c) (Res. App. at 10a).

spondent] exercises . . . an important foreign policy function on behalf of the U.S. Government." *Id.* at 811 (Res. App. at 19a). Accordingly, "[t]he manner in which these instructions are formulated and conveyed to [respondent] is itself a critical policy matter." (*Id.* at 20a). Respondent must circulate in advance the proposed agenda for each INTELSAT meeting to designated government officials. The Department of State is then required to "instruct [respondent] that it shall not take action on such agenda items until it receives U.S. Government instructions," which instructions are to be issued to respondent expeditiously. (*Id.* at 21a). Pursuant to a 1984 Memorandum of Understanding between the Departments of State and Commerce, the FCC and respondent, the practice has been that "*[t]he Department of State will continue to issue instructions prior to or during each INTELSAT meeting and [respondent] agrees to be bound by such instructions.*" Memorandum of Understanding, signed by the Departments of State and Commerce, the FCC and COMSAT at ¶ 8 (Sept. 28, 1984) (Res. App. at 25a) (emphasis added).

Consideration of Separate Systems

Commencing in 1983, the Federal Communications Commission received several applications for non-INTELSAT communications satellite systems by U.S. companies, including an application from petitioners. Thereafter, in 1984 President Reagan issued Presidential Determination 85-2, pursuant to his authority and responsibility to determine whether additional international satellite systems were "required in the national interest" under sections 701(d) and 721(a) of the CSA. Presidential Determination No. 85-2, 3 C.F.R. 254 (1985) (Pet. App. at D38). While finding that separate satellite systems were in the national interest, the President also determined that the development of any separate system must comply with United States international agreements and commitments

to INTELSAT and its member-nations. (*Id.*) Consequently, the President directed the Secretaries of State and Commerce to "inform the Federal Communications Commission of criteria necessary to ensure [that] the United States" consults with INTELSAT before final authorization of any separate system "in order to meet its obligations" under the Definitive Agreement. (*Id.*)

Pursuant to this Presidential Determination, the Secretaries of State and Commerce jointly prescribed, *inter alia*, the following requirements that must be satisfied *prior* to final FCC authorization of any separate satellite system:

* * * *

> (2) *one or more foreign authorities are to authorize use of each system and enter into consultation procedures with the United States Party* under Article XIV(d) of the INTELSAT Agreement to ensure technical compatibility and to avoid significant economic harm.

Letter from Secretary of State George P. Shultz and Secretary of Commerce Malcolm Baldrige to Mark S. Fowler, Chairman of the Federal Communications Commission (Nov. 28, 1984) (Res. App. at 27a-28a) (emphasis added).

The Executive Branch's well-considered resolution of the separate satellite system issue in a way that supports such systems while honoring our government's binding commitments to INTELSAT was expressly endorsed and ratified by Congress in the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987 ("FRAA"), Pub. L. No. 99-93, 99 Stat. 405 (1985) (Res. App. at 29a-32a). The FRAA requires compliance with the conditions set forth in Presidential Determination 85-2 as well as a determination that "one or more foreign authorities have authorized the use of such system consistent with such conditions" as a precondition to consultation with INTELSAT. FRAA § 146(b)(2) (Res. App. at 30a).

The FRAA also restates, as a matter of United States statutory law, the requirements set forth in Article XIV(d) of the Definitive Agreement that any separate satellite system must be technically compatible with and avoid significant economic harm to the INTELSAT system. § 146(a)(2)(A) & (B) (Res. App. at 29a-30a).

On July 25, 1985, the FCC issued a Report and Order regarding petitioners' application as well as other pending applications for separate systems. *In re Establishment of Satellite Systems Providing International Communications*, FCC Docket No. 84-1299 (July 25, 1985) ("Report and Order") (Res. App. at 33a-43a). Although the Report and Order generally recognized the benefits of separate satellite systems, it did not constitute final approval of any particular separate satellite system. The Report and Order expressly stated that the Commission would not issue a final license for the operation of any separate system "*until the United States has completed coordination of that system with INTELSAT* pursuant to Article XIV(d) of the INTELSAT Agreement *and we have been informed by the Department of State that the United States has fulfilled its obligation under Article XIV(d).*" (*Id.* at 41a) (emphasis added).

In September 1985, the FCC preliminarily approved petitioners' application to construct and operate a separate satellite system. Following favorable Article XIV(d) consultation and a favorable resolution by the Assembly of Parties, petitioners received final FCC approval to launch its PAS I satellite for communications between the United States and Peru in September 1987. Subsequently, petitioners have been successful without exception in their Article XIV(d) consultations, having obtained to date approval from the INTELSAT Assembly of Parties to provide international satellite services to over 36 countries.[11] Following Article XIV(c) consulta-

[11] These countries include: Peru, the United Kingdom, Germany, Sweden, Luxembourg, Ireland, Costa Rica, the Dominican Republic,

tions, petitioners have also received INTELSAT approval for the provision of domestic satellite services in over 19 countries.[12] Thus, contrary to the complaint, petitioners have not been deterred from successfully providing international satellite services throughout most of Western Europe, Latin America and the Caribbean.

Decisions of the Lower Courts

Respondent moved to dismiss petitioners' complaint on a number of grounds including express and implied immunity, political question, act of state, lack of extraterritorial jurisdiction, *Noerr-Pennington*, and failure to join indispensable parties under Fed.R.Civ.P. 19. On September 14, 1991, the district court granted respondent's motion to dismiss on the ground that international executive agreements to which the United States is a party, as well as the Executive Branch's pervasive control over respondent's activities as Signatory, confer upon respondent immunity from petitioners' claims. (Pet. App. at B18). The district court referred to Paragraph 16 of the INTELSAT Headquarters Agreement, which provides immunity from suit to "*the representatives of the Parties* and of the Signatories." (*Id.* at B13) (emphasis added by the court). Since respondent is the representative of the United States party to INTELSAT, as the complaint repeatedly alleges (Complaint ¶¶ 11, 12, 23, 28(a)-(c); Pet. App. at C6-7, 14, 17-18) and as expressly provided by Executive Order, the district court concluded that the immunities recited in the Headquarters Agree-

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Brazil, Guatemala, Honduras, the Bahamas, Portugal, Argentina, Italy, France, Austria, the Netherlands, Denmark, Switzerland, Monaco, Belgium, Spain, Greece, Mexico, Barbados, Haiti, Panama, Trinidad and Tobago, Bolivia, Colombia, Ecuador, Venezuela, Uruguay and Paraguay.

[12] These countries include: Peru, the United Kingdom, Chile, Spain, Italy, Portugal, the Netherlands, Haiti, Guatemala, the Bahamas, Argentina, Bolivia, Colombia, Ecuador, Uruguay, Paraguay, Venezuela, Honduras and Panama.

ment apply to respondent. (Pet. App. at B13). The district court further ruled that Paragraph 16 of the Headquarters Agreement "implements the directive of Art. XV(c) of the Definitive Agreement," in which the member-nations of INTELSAT, including the United States, agreed to confer "appropriate privileges and immunities to Intelsat . . . to Parties . . . [and] to Signatories [*e.g.*, Comsat] and representatives of Signatories." (*Id.*)

After a detailed analysis of the CSA and its legislative history, the district court concluded that the "antitrust consistency" provision in § 701(c) relates only to "the activities of Comsat and its owners as communications common carriers and not to Comsat's activities as United States representative to the global satellite system subject to Executive Branch regulation." (*Id.* at B16). Section 701(c) should not be read more broadly to subject COMSAT to suit in its role as United States representative and Signatory to INTELSAT, the district court found, because "Congress could not have intended to require Comsat to participate in Intelsat subject to Executive Branch directives and, at the same time, have intended that Comsat proceed at its own antitrust peril in carrying out that official role." (*Id.* at B14).[13]

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[13] In the alternative, the district court dismissed the complaint for failure to join indispensable parties, *viz.* INTELSAT, its member-nations and their Signatories, under Fed.R.Civ.P. 19. (Pet. App. B19). The district court noted that "[t]he lion's share of the complaint's allegations depict concerted action between Comsat and Intelsat's member-nations" (*id.*) and further noted that "[respondent] has no role in many of the kinds of actions alleged to have injured [petitioners] and to have been undertaken by individual foreign nations or groups of foreign nations." (*Id.* at B20). Finally, the district court dismissed petitioners' state law claims for failure to allege the requisite elements of a claim for interference with prospective advantage. (*Id.* at B21). The district court did not address the other grounds for dismissal raised by respondent.

On September 30, 1991, the Second Circuit affirmed the district court's decision that respondent was immune from antitrust challenge in its role as Signatory to INTELSAT because "exposure of [respondent] to antitrust liability *in its role as United States signatory to INTELSAT* is entirely inconsistent with the responsibilities Congress entrusted to COMSAT under the CSA." (Pet. App. A12) (emphasis in original). The Second Circuit further stated in this regard:

> COMSAT, as United States Signatory to INTELSAT, must participate in the consultations that determine to what extent competing satellite systems will be permitted under Article XIV(d) of the Definitive Agreement. Having created COMSAT to wield monopoly power, along with the other participants in a global satellite system, Congress did not expect that corporation to face antitrust liability in deciding, as a member of INTELSAT, whether and to what extent to permit competition.

(Pet. App. at A12).

In reaching its decision on immunity, the Second Circuit also carefully reviewed the INTELSAT Agreements and found that the Definitive Agreement and the Headquarters Agreement (which implements the Definitive Agreement) must be read as providing immunity to "representatives of Parties and to Signatories" such as respondent. (*Id.*)

The Second Circuit also agreed with the district court that the "'antitrust consistency clause' in Section 701(c) of the CSA applies only to [respondent's] role (and that of its owners) as common carrier and not to its role as United States representative to INTELSAT." (*Id.*) In so ruling, the Second Circuit found that "[t]he principal antitrust concern voiced within Congress during the consideration of the CSA, once the fundamental decision was made to create a private corporation with monopoly powers, was that the common carriers participating in ownership of COMSAT would use their ownership posi-

tion for private anti-competitive purposes." (*Id.* at A12-13). There was, however, "no hint in this catalogue of concerns that [respondent's] role as participant in INTELSAT must conform to antitrust limitations." (*Id.* at A13).

Finally, the Second Circuit carefully reviewed the complaint allegations and expressly found that they were "directed primarily to actions taken by [respondent] acting as a Signatory to INTELSAT . . . ." (*Id.*) Nonetheless, the Second Circuit reversed and remanded to allow petitioners to "winnow out the few allegations that arguably" are based solely on non-immune conduct; that is, conduct undertaken in COMSAT's role as a common carrier. (*Id.*)[14]

Subsequent to the Second Circuit's reversal and remand to the district court, petitioners filed on November 13, 1991, a second amended complaint which is now pending in the United States District Court for the Southern District of New York.

REASONS FOR DENYING THE PETITION

The decision below is correct and presents no issue that warrants further review by this Court. The Second Circuit applied settled principles of law to this case, and reached a plainly correct result that does not conflict with any decision of this Court or of any other court of appeals.

Further, the Second Circuit's decision was largely based on the meaning and effect of the INTELSAT

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[14] Dismissal of petitioners' state law claims for tortious interference with business opportunities was also affirmed by the Second Circuit "since all of [the] allegations [in petitioners' state law claim] concern COMSAT's consultative activity within INTELSAT relating to the authorization of a competing satellite system. Those are plainly 'Signatory' activities." (Pet. App. at A15). Leave to amend was granted with respect to petitioners' state law claims, as well. (*Id.*)

Agreements and § 701(c) of the Communications Satellite Act, 47 U.S.C. §§ 701-744 (1988) ("CSA") (Pet. App. at D2-23). As petitioners readily admit, "*[t]he question presented by this petition has not been addressed before, and may not be addressed again.*" (Pet. 17) (emphasis added). Thus, the Second Circuit's decision presents no question of general public importance warranting this Court's review. *See e.g., Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (issues must be "beyond the academic or the episodic").

The Second Circuit Crafted a Limited Immunity Based, in Part, Upon Immunity Provisions in the INTELSAT Agreements

The first argument proffered by petitioners is that the Second Circuit's decision rests upon a finding of implied immunity and grants to respondent broad, unlimited immunity from the antitrust laws. (Pet. at 17). On both points, petitioners misstate the Second Circuit's holding, which crafted a narrowly drawn immunity based, in part, upon the express immunity provisions in the INTELSAT Agreements.

Contrary to petitioners' brief, the immunity found by the Second Circuit to be applicable here is *not* "largely by implication." (*Id.*) The pertinent INTELSAT Agreements confer immunity upon respondent for actions taken in its role as Signatory and both the district court and the Second Circuit correctly so held. The Definitive Agreement directed each member-nation of INTELSAT to grant appropriate immunities to Signatories, among others. This directive was implemented by paragraph 16 of the Headquarters Agreement, pursuant to which the United States bound itself to provide immunity from suit and legal process to the "officers and employees of INTELSAT, *the representatives of the parties and of*

the Signatories . . . relating to acts performed by them in their official capacity and falling within their functions." (Pet. App. at D232) (emphasis added).[15]

Moreover, the immunity from the antitrust laws that the lower courts afforded respondent is not overbroad or unrestricted, but rather is limited to its activities as Signatory.[16] The Second Circuit was compelled to find such limited immunity because "exposure of [respondent] to antitrust liability *in its role as United States Signatory to INTELSAT* is entirely inconsistent with the responsibilities Congress entrusted to [respondent] under the CSA." (Pet. App. at A12) (emphasis in original). The CSA expressly created respondent as the official representative of our nation's interests in the global satellite system (47 U.S.C. § 701(c); Pet. App. at D2), and the President conferred upon the Secretary of State the responsibility for issuing instructions to respondent "in its role as the designated United States representative to [INTELSAT]." Executive Order No. 12,046, § 5-202(a) (Res. App. at 15a). As the United States representative, respondent is the official instrument of the United States in carrying out U.S. policy in the field of international satellite communications subject to Executive Branch direction and control.

In addition to express immunity, respondent is entitled to derivative immunity based upon INTELSAT's im-

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[15] The holdings of both the district court and Second Circuit that the express provisions of the Headquarters and Definitive Agreement together confer immunity upon respondent in its role as the official United States representative to INTELSAT, correctly discharge their judicial function in intepreting international agreements, namely, "giving effect to the intent of the Treaty parties." *Sumitomo Shoji Am. Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). *See Chan v. Korean Airlines, Ltd.*, 109 S. Ct. 1676, 1683 (1989) ("[w]e must thus be governed by the treaties—solemnly adopted by the governments of many separate nations . . ."). *See also In re Ross*, 140 U.S. 453, 475 (1891).

[16] The district court explicitly recognized that "the antitrust laws must be construed liberally and that antitrust immunity is disfavored." (Pet. App. at B12).

munity from suit. The lower courts correctly rejected petitioners' effort to attack INTELSAT, which is immune from suit, through the indirect route of suing respondent for participating in official INTELSAT activities. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987) (barring suits that seek to "do indirectly what they could not do directly").

In designating INTELSAT as an international organization entitled to immunity under the International Organizations Immunities Act, 22 U.S.C. §§ 288 *et seq.* (1988) ("IOIA") (Pet. App. at D24-37),[17] the President specified that INTELSAT is "entitled to enjoy the privileges, exemptions and immunities conferred by the [IOIA]." Executive Order No. 11,966, 3 C.F.R. 158 (1978) (Res. App. at 7a). This expansive language confirms the President's intention to confer upon INTELSAT the full range of statutory immunities. But INTELSAT's immunity from suit would be rendered meaningless if petitioners were allowed to sue any Signatory for its conduct as Signatory, especially where, as here, such conduct was allegedly undertaken in concert with

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[17] INTELSAT was most recently so designated by President Ford on January 19, 1977. Executive Order No. 11,966, 3 C.F.R. 90 (1978) (Res. App. at 7a). *See Weidner v. INTELSAT*, 392 A.2d 508, 510 (D.C. 1978). The IOIA defines an "international organization" as "a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress . . . and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter." 22 U.S.C. § 288 (Pet. App. at D24). *See Restatement (Third) of Foreign Relations Law of the United States* §§ 467 (comment f), 467(2) (1987); *Boimah v. United Nations General Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987). The IOIA provides "immunity from suit and every form of judicial process," 22 U.S.C. § 288a(b) (Pet. App. at D26), and specifies that the property and assets of an international organization, wherever located and by whomever held, are immune and that the organization's archives "shall be inviolable." 22 U.S.C. § 288a(c) (Pet. App. at D26).

INTELSAT, its member-nations and their official representatives.

In finding immunity for respondent in its role as a Signatory to INTELSAT, the Second Circuit afforded respondent the narrowest immunity possible consistent with the express intent and provisions of the CSA, the Executive Branch directives and control over respondent as Signatory and the INTELSAT Agreements.[18] At the same time, the Second Circuit reversed and remanded to allow petitioners to file an amended complaint limited to "allegations of anticompetitive conduct [if any] by COMSAT in its 'separate role'" as common carrier. (Pet. App. at A13). Petitioners have subsequently filed an amended complaint which is now pending in the district court.

The Petitioners' Complaint, Not the Second Circuit Decision, Would Undermine the 1984 Presidential Determination

Petitioners next contend that the Second Circuit's decision is inconsistent with and undermines the 1984 Presi-

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[18] The Second Circuit rejected petitioners' argument that the mere semantic differences between Article XV of the Definitive Agreement and paragraph 16 of the Headquarters Agreement negated the clear intent of the INTELSAT Agreements to afford immunity to all Signatories. Indeed, in reaching its conclusion on immunity, the Second Circuit reasoned that:

> The Headquarters Agreement implements the Definitive Agreement. The Definitive Agreement requires each party to grant appropriate immunities "to INTELSAT . . . to Parties and representatives of Parties, *to Signatories* and representatives of Signatories." Definitive Agreement Art. XV(c) (emphasis added). Though this phrasing arguably distinguishes between "representatives of Parties" and "Signatories," its primary significance lies in its explicit direction to immunize "Signatories." . . . [I]t places no strain on the phrase "representatives of the Parties" to place signatories within that category. COMSAT is "the designated United States representative to" INTELSAT, *see* Executive Order No. 12,046.

(Pet. App. at A11).

dential Determination that separate systems are "'required in the national interest.'" (Pet. at 17). Petitioners, however, fundamentally misstate the nature and scope of the Presidential Determination.

The 1984 Presidential Determination created a careful balance between the development of separate, non-INTELSAT systems and continued fidelity to INTELSAT's existing global system. The President specifically found that while separate satellite systems were in the national interest, any effort to establish such systems must comply with our government's international agreements and commitments to INTELSAT and its member-nations. *The Determination specifically recognizes and promotes the policy of the CSA by allowing private systems only if certain pre-conditions are met, including compliance with the consultation procedures under the INTELSAT Agreements.*[19] Consistent with Article XIV of the INTELSAT Definitive Agreement, the President directed the United States to consult with INTELSAT *before* final authorization of any separate system in order to meet our nation's obligations under that Agreement.

In contrast, petitioners' complaint ignores the framework of the CSA, the INTELSAT Agreements and our government's stated foreign policy objectives in the area of international satellite communications. Petitioners' complaint seeks by means of a private lawsuit to negate our government's binding international commitments, including those specifically reaffirmed in the 1984 Presidential Determination, in favor of the petitioners' own narrow self-interest. It is the petitioners' complaint, not the Second Circuit's decision, which seeks to undermine the 1984 Presidential Determination, as well as

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[19] As the Second Circuit recognized: "Congress enacted the Communications Satellite Act of 1962 to implement the national policy of establishing 'in conjunction and in cooperation with other countries, as expeditiously as practicable, a commercial communications satellite system.'" (Pet. App. at A3).

U.S. foreign policy in the field of international satellite communications carefully formulated and established over the last 25 years.

The Lower Courts' Reading of Section 701(c) is Compelled by the Language, Structure and Purpose of the CSA and its Legislative History

The third ground for review proffered by petitioners is that the Second Circuit's grant to respondent of limited immunity conflicts with section 701(c) of the CSA which provides, in part, that respondent's activities should remain "consistent with" the antitrust laws. (Pet. at 20-21).[20] As the Second Circuit correctly held, however, the "antitrust consistency" clause in section 701(c) "applies only to COMSAT's role (and that of its owners) as common carrier and not to its role as United States representative to INTELSAT." (Pet. App. at A12). Having decided that respondent should be created as a private corporation with the sole right of access to the global satellite system, Congress included the "antitrust consistency" language to address the concern "that the common carriers [such as AT&T] participating in ownership of COMSAT would use their ownership position for private anti-competitive purposes." (*Id.* at A12-13).[21]

It is evident, even from the excerpts of legislative history that petitioners quote in the Petition, that the antitrust concern voiced in Congress related solely to the

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[20] Petitioners repeatedly misquote the language of § 701(c) by arguing that it requires respondent's conduct to be "subject to" the antitrust laws. (*See, e.g.*, Pet. at 5, 20).

[21] Section 743(b)(2) of the CSA contains detailed provisions governing the extent to which communications common carriers may own COMSAT's shares. Indeed, as originally enacted, this section reserved 50% of COMSAT's shares for purchase by communications common carriers. Pub. L. No. 87-624; § 304(b)(2), 76 Stat. 419, 424 (1962), *amended by* Pub. L. No. 97-410, 96 Stat. 2043, 2045 (1983).

activities of COMSAT's owners as communications common carriers, and not to COMSAT's activities as the United States representative to the global satellite system subject to Executive Branch supervision.[22]

For instance, petitioners quote the following testimony of Assistant Attorney General Nicholas Katzenbach before the Senate Commerce Committee in response to antitrust concerns of Senator Estes Kefauver:

> Indeed, the whole thrust of the Department of Justice's participation in this bill has been to make the communications system more competitive and to use this as a device for ensuring that no single carrier would get monopoly control over this great new satellite system.

(Pet. at 7). The concern that common carriers such as AT&T would dominate the newly formed corporation through their ownership role in COMSAT is further highlighted in another portion of Mr. Katzenbach's testimony quoted in petitioners' Petition:

> Let me be clear. *It does exempt to the extent that it permits these carriers to participate in this corporation, which could conceivably otherwise be a joint venture, which would be precluded by the antitrust laws. To the extent that they are permitted by this law to invest in this corporation, it modifies what might otherwise be the situation.*
>
> Beyond that, as I have stated, I don't think that it would modify the antitrust laws any further than that. It has been my understanding that *those who*

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[22] The treaties governing INTELSAT, including the Definitive and the Headquarters Agreements, were signed almost a decade subsequent to the legislative debate on the CSA. It strains credibility to suggest, as petitioners must, that the Executive Branch was unaware of the "antitrust consistency" language in section 701(c) of the CSA when promulgating the immunity provisions of the INTELSAT Agreements. Only when the "antitrust consistency" lanugage is read in the context of Congressional concern over the ownership of COMSAT, can section 701(c) be interpreted in a manner compatible with the INTELSAT Agreements.

> *have said it was modifying the antitrust laws have had simply that point in mind.* But I would have no objection to explicit provisions that stated that the antitrust laws were continued to be in full force and effect *with respect to the participants in this venture.*

(Pet. at 7-8) (emphasis added). Indeed, as the district court specifically recognized, the Department of Justice defined the phrase "consistent with the antitrust laws" as follows:

> [T]he Department of Justice believes that to be *consistent with the antitrust laws* any plan adopted must meet certain conditions. These conditions are:
>
> (1) All interested communication common carriers be given an opportunity to participate in the ownership of the system;
>
> (2) All interested communication common carriers be given unrestricted use on nondiscriminatory terms of the facilities of the system whether or not they elect to participate in ownership;
>
> (3) All interested parties engaged in the production and sale of communication and related equipment be given the opportunity to participate in ownership of the system; and
>
> (4) All interested parties engaged in the production and sale of communication and related equipment be given unrestricted opportunity to furnish such equipment to the system whether or not they elect to participate in ownership.

Space Satellite Communications: Hearings Before the Subcomm. on Monopoly of the Select Comm. on Small Business, 87th Cong., 1st Sess. 29 (1961) (statement of Lee Loevinger, Assistant Attorney General, Antitrust Division) (Pet. App. at B16-17). As the Second Circuit duly noted, this "catalogue of concerns" was incorporated in section 701(c) in the very sentence that concludes with the "antitrust consistency" clause:

> It is the intent of Congress that all authorized users shall have nondiscriminatory access to the system; that maximum competition be maintained in the provision of equipment and services utilized by the system; that the corporation created under this chapter be so organized and operated as to maintain and strengthen competition in the provision of communications services to the public; and that the activities of the corporation created under this chapter and of the persons or companies participating in the ownership of the corporation shall be consistent with the Federal antitrust laws.

(Pet. App. at A12-13).

In sum, the lower courts correctly rejected petitioners' overbroad construction of the "antitrust consistency" clause in § 701(c) that would negate the immunity essential to respondent's activities as the United States Signatory and abrogate our government's binding obligations to INTELSAT and its member-nations. As recently stated in *Finnegan v. Campeau Corp.*, 915 F.2d 824, 826 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1624 (1991), it should not be concluded "that Congress was so muddled that it gave with the right hand . . . that which it then took away with the left hand of antitrust law . . . ." *See also Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) ("the act cannot be held to destroy itself"). Only a reading of section 701(c) that does not subject respondent to antitrust claims in its role as Signatory, but rather limits its application to respondent's conduct as common carrier, permits the provisions and policies of the CSA, the subsequent Presidential directives, the INTELSAT Agreements and the IOIA to be given effect and to be read harmoniously.

Limited Immunity for Respondent in its Role as Signatory is Compelled by the CSA and the Executive Branch's Pervasive Regimen for Directing Respondent in that Role

Petitioners also take issue with the Second Circuit's conclusion that " 'Congress could not have intended to

require Comsat to participate in Intelsat subject to Executive Branch directives, and, at the same time, have intended that Comsat proceed at its own antitrust peril in carrying out that official role." (Pet. App. at A12). Petitioners incredulously argue that "this is exactly what Congress did expect." (Pet. at 21). However, as Assistant Attorney General Katzenbach testified in hearings on the CSA, "[T]he mere doing of what [COMSAT is] permitted to do under this bill is not itself going to result in an offense against the Sherman Act." *Antitrust Problems of the Space Satellite Communication System: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 58 (1962) (testimony of of Asst. Atty Gen. Katzenbach) (Pet. App. at A13).

Finding limited immunity for respondent in its role as the United States representative and Signatory to INTELSAT not only is required by the language, structure and purpose of the CSA, but also is necessary to ensure that the statutory scheme for implementing U.S. foreign policy with respect to international satellite communications can "work as it was intended." *Gordon v. NYSE, Inc.*, 422 U.S. 659, 691 (1975). In contrast, petitioners' argument ignores both the framework of the CSA and our government's stated foreign policy objectives.

In petitioners' view, respondent is at risk under the antitrust laws whenever respondent proceeds, under the supervision and direction of the Executive Branch, to vote on resolutions at INTELSAT meetings, to participate in Article XIV consultations or to participate in INTELSAT pricing or procurement decisions. But those actions are plainly within the statutory grant of authority to respondent to "plan, initiate, construct, own, manage, and operate" the global communications satellite system. 47 U.S.C. § 735(a)(1) (Pet. App. at D19).

Under petitioners' theory, any vote by respondent at an INTELSAT meeting or any INTELSAT resolution not

to petitioners' liking could form the basis for a claim against respondent for unlawful monopolization or conspiracy with other INTELSAT Signatories. But, as both the district court and the Second Circuit recognized, respondent's statutory mandate is to participate in just such INTELSAT meetings, resolutions and decisions, under the direction of the Executive Branch. (Pet. App. at A12).

In short, under petitioners' theory, respondent can take no action in its role as Signatory without risking antitrust liability. Indeed, under petitioners' theory, any act by respondent to maintain, preserve or strengthen the global satellite communications system could be alleged to be an act of monopolization. But, as the Second Circuit recognized, Congress expressly intended that the global system would be maintained, preserved and strengthened; and it would violate the Congressional mandate in the CSA for respondent as the official United States representative to act otherwise. (*Id.*)[23]

While conceding that respondent is not liable under the antitrust laws for carrying out instructions or directives of the United States Government, petitioners argue that they seek to hold respondent liable only for anticompetitive activities which it allegedly "has entered into at Intelsat purely in its discretionary functions, and not by reason of any governmental directive or instruction." (Pet. at 23-24). This argument falls short for a number of reasons.

First, the complaint makes no distinction between alleged conduct of respondent as Signatory in carrying out the government's instructions and other alleged conduct by respondent as Signatory. Petitioners first raised this *ultra vires* argument in their reply brief in the Second

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[23] Indeed, as recently as 1985, "[t]he Congress declare[d] that it is the policy of the United States as a party to [INTELSAT], to foster and support the global commercial communications system owned and operated by Intelsat." FRAA, § 146(a)(1) (Res. App. at 29a).

Circuit. "'[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.'" *Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988) (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985)). *See also Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 687 F. Supp. 832, 836 (S.D.N.Y. 1988).

Second, implicit in petitioners' argument is the proposition that respondent has immunity when carrying out its official activities as Signatory subject to United States instructions. Petitioners cannot avoid the dispositive effect of this admission by arguing that they are only challenging respondent's official activities when it allegedly departs from instructions of the United States Government.[24] *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *Butz v. Economou*, 438 U.S. 478, 507 (1978); *Donald v. Orfila*, 618 F. Supp. 645, 648 (D.D.C. 1985) ("where the acts of the defendant were performed in his official capacity and fell within his functions as Secretary General of the OAS, the defendant is absolutely immune from suit") *aff'd*, 788 F.2d 36 (1986).

Third, petitioners' argument ignores the nature of respondent's role as the United States Signatory to INTELSAT. As the Second Circuit found, respondent, in its role as Signatory, is subject to extensive supervision and direction by both the Executive Branch and Congress.[25] (Pet. App. at A5-7.) It is through this in-

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[24] As the Second Circuit found: "The [CSA] imposes a duty on COMSAT to 'comply . . . with all provisions of th[e] chapter,' 47 U.S.C. § 743(c), and authorizes a district court, on application of the Attorney General, to enjoin COMSAT from taking any action or adopting any practices or policies inconsistent with 'the policy and purposes declared in section 701' of the Act, *id.* § 743(a)." (Pet. App. at A3).

[25] For instance, the Second Circuit recognized that:

> Pursuant to the directive in section 721(a)(4) to oversee COMSAT's relations with foreign governments, Executive Or-

structional process that respondent, in its capacity as Signatory to INTELSAT, is subject to detailed directions from the Executive Branch "prior to or during each INTELSAT meeting." Memorandum of Understanding, signed by the Departments of State and Commerce, the FCC and COMSAT at ¶ 8 (Res. App. at 25a). Each relevant government agency reviews in advance all INTELSAT meeting agendas and must advise the Department of State "of those items on which it believes prior U.S. government instructions to [respondent] are required." *COMSAT Study* (Res. App. at 20a). The Department of State directs that respondent "shall not take action on such agenda items until" after the State Department has coordinated the views of all participating agencies and has "issue[d] instructions to Comsat as to the position it should take on the agenda items." (*Id.* at 22a). Once the Executive Branch has reached a considered policy determination, respondent, as Signatory to INTELSAT, must implement that policy and communicate the government's views to its INTELSAT counterparts.

There is, accordingly, no merit to petitioners' contention that their complaint somehow is based solely on those alleged activities by respondent as Signatory not involv-

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der No. 12,046 specifies that '[w]ith respect to telecommunications, the Secretary of State shall exercise primary authority for the conduct of foreign policy, including the determination of United States positions and the conduct of United States participation in negotiations with foreign governments and international bodies.' 43 Fed. Reg. 13,349, 13,354 (1978). In particular, the Secretary should 'instruct[] [COMSAT] in its role as the designated United States representative to [INTELSAT]' and 'direct the foreign relations of the United States with respect to actions under the Communications Satellite Act of 1962.' *Id.*; *see also Procedures for U.S. Government Instruction of the Communications Satellite Corporation in its Role as U.S. Representative to the Interim Communications Satellite Commission* [sic], 77 F.C.C.2d 564 (1980); 1984 Memorandum of Understanding among the Department of State and Commerce and the Federal Trade [sic] Commission.

(Pet. App. at A5-6).

ing governmental directives or instructions. Petitioners' contention is particularly disingenous in light of the complaint's specific allegations that respondent, *as the United States representative to INTELSAT*, has allegedly failed to implement United States policy. (Complaint ¶¶ 28(b), (c); Pet. App. at C18). Petitioners' attempt to rewrite their complaint to obtain judicial review of the Executive Branch's foreign policy decisions in the area of international satellite communications should be rejected.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

1721 (XVI). International co-operation in the peaceful uses of outer space

A

The General Assembly,

Recognizing the common interest of mankind in furthering the peaceful uses of outer space and the urgent need to strengthen international co-operation in this important field,

Believing that the exploration and use of outer space should be only for the betterment of mankind and to the benefit of States irrespective of the stage of their economic or scientific development,

1. *Commends* to States for their guidance in the exploration and use of outer space the following principles:

(*a*) International law, including the Charter of the United Nations, applies to outer space and celestial bodies;

(*b*) Outer space and celestial bodies are free for exploration and use by all States in conformity with international law and are not subject to national appropriation;

2. *Invites* the Committee on the Peaceful Uses of Outer Space to study and report on the legal problems which may arise from the exploration and use of outer space.

1085th plenary meeting,
20 December 1961.

B

The General Assembly,

Believing that the United Nations should provide a focal point for international co-operation in the peaceful exploration and use of outer space,

1. *Calls upon* States launching objects into orbit or beyond to furnish information promptly to the Committee on the Peaceful Uses of Outer Space, through the Secretary-General, for the registration of launchings;

2. *Requests* the Secretary-General to maintain a public registry of the information furnished in accordance with paragraph 1 above;

3. *Requests* the Committee on the Peaceful Uses of Outer Space, in co-operation with the Secretary-General and making full use of the functions and resources of the Secretariat:

(*a*) To maintain close contact with governmental and non-governmental organizations concerned with outer space matters;

(*b*) To provide for the exchange of such information relating to outer space activities as Governments may supply on a voluntary basis, supplementing but not duplicating existing technical and scientific exchanges;

(*c*) To assist in the study of measures for the promotion of international co-operation in outer space activities;

4. *Further requests* the Committee on the Peaceful Uses of Outer Space to report to the General Assembly on the arrangements undertaken for the performance of those functions and on such developments relating to the peaceful uses of outer space as it considers significant.

1085th plenary meeting,
20 December 1961.

3a

C

The General Assembly,

Noting with gratification the marked progress for meteorological science and technology opened up by the advances in outer space,

Convinced of the world-wide benefits to be derived from international co-operation in weather research and analysis,

1. *Recommends* to all Member States and to the World Meteorological Organization and other appropriate specialized agencies the early and comprehensive study, in the light of developments in outer space, of measures:

(*a*) To advance the state of atmospheric science and technology so as to provide greater knowledge of basic physical forces affecting climate and the possibility of large-scale weather modification;

(*b*) To develop existing weather forecasting capabilities and to help Member States make effective use of such capabilities through regional meteorological centres;

2. *Requests* the World Meteorological Organization, consulting as appropriate with the United Nations Educational, Scientific and Cultural Organization and other specialized agencies and governmental and non-governmental organizations, such as the International Council of Scientific Unions, to submit a report to the Governments of its Member States and to the Economic and Social Council at its thirty-fourth session regarding appropriate organizational and financial arrangements to achieve those ends, with a view to their further consideration by the General Assembly at its seventeenth session;

3. *Requests* the Committee on the Peaceful uses of Outer Space, as it deems appropriate, to review that report and submit its comments and recommendations to the Economic and Social Council and to the General Assembly.

1085th plenary meeting,
20 December 1961.

D

The General Assembly,

Believing that communication by means of satellites should be available to the nations of the world as soon as practicable on a global and non-discriminatory basis,

Convinced of the need to prepare the way for the establishment of effective operational satellite communication,

1. *Notes with satisfaction* that the International Telecommunication Union plans to call a special conference in 1963 to make allocations of radio frequency bands for outer space activities;

2. *Recommends* that the International Telecommunication Union consider at that conference those aspects of space communication in which international co-operation will be required;

3. *Notes* the potential importance of communication satellites for use by the United Nations and its principal organs and specialized agencies for both operational and informational requirements;

4. *Invites* the Special Fund and the Expanded Programme of Technical Assistance, in consultation with the International Telecommunication Union, to give sympathetic consideration to requests from Member States for technical and other assistance for the survey of their communication needs and for the development of their domestic communication facilities, so that they may make effective use of space communication;

5. *Requests* the International Telecommunication Union, consulting as appropriate with Member States, the United Nations Educational, Scientific and Cultural Organization and other specialized agencies and governmental and non-governmental organizations, such as the Committee on Space Research of the International Council of Scientific Unions, to submit a report on the imple-

mentation of these proposals to the Economic and Social Council at its thirty-fourth session and to the General Assembly at its seventeenth session;

6. *Requests* the Committee on the Peaceful Uses of Outer Space, as it deems appropriate, to review that report and submit its comments and recommendations to the Economic and Social Council and to the General Assembly.

1085th plenary meeting,
20 December 1961.

E

The General Assembly,

Recalling its resolution 1472 (XIV) of 12 December 1959,

Noting that the terms of office of the members of the Committee on the Peaceful Uses of Outer Space expire at the end of 1961,

Noting the report of the Committee on the Peaceful Uses of Outer Space,[1]

1. *Decides* to continue the membership of the Committee on the Peaceful Uses of Outer Space as set forth in General Assembly resolution 1472 (XIV) and to add Chad, Mongolia, Morocco and Sierra Leone to its membership in recognition of the increased membership of the United Nations since the Committee was established;

2. *Requests* the Committee on the Peaceful Uses of Outer Space to meet not later than 31 March 1962 to carry out its mandate as contained in General Assembly resolution 1472 (XIV), to review the activities provided for in resolutions A, B, C and D above and to make such reports as it may consider appropriate.

1085th plenary meeting,
20 December 1961.

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[1] *Official Records of the General Assembly, Sixteenth Session, Annexes*, agenda item 21, document A/4987.

APPENDIX B

Executive Order 11966 January 19, 1977

Designating Certain Public International Organizations Entitled To Enjoy Certain Privileges, Exemptions, and Immunities

By virtue of the authority vested in me by Section 1 of the International Organizations Immunities Act (59 Stat. 669, 22 U.S.C. 288), and as President of the United States of America, having found that the United States participates in the following organizations, it is hereby ordered as follows:

SECTION 1. The International Development Association, in which the United States participates pursuant to the Act of Congress approved June 30, 1960 (74 Stat. 293, 22 U.S.C. 284) and the Articles of Agreement of the International Development Association (11 U.S.T. 2284, T.I.A.S. 4607), is hereby designated as a public international organization entitled to enjoy the privileges, exemptions, and immunities conferred by the International Organizations Immunities Act, provided that, this designation shall not affect in any way the applicability of Section 3, Article VIII, of the Articles of Agreement of the International Development Association.

SEC. 2. The International Centre for Settlement of Investment Disputes, in which the United States participates pursuant to the Act of Congress approved August 11, 1966 (80 Stat. 344, 22 U.S.C. 1650) and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (17 U.S.T. 1270, T.I.A.S. 6090), is hereby designated as a public international organization entitled to enjoy the privileges, exemptions, and immunities conferred by the International Organizations Immunities Act.

SEC. 3. The International Telecommunications Satellite Organization (INTELSAT), in which the United States participates pursuant to the authority of the Communications Satellite Act of 1962 (76 Stat. 419, 47 U.S.C. 701-744) and in accord with the Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT) and the Operating Agreement signed pursuant thereto (TIAS 7532), is hereby designated as a public international organization entitled to enjoy the privileges, exemptions, and immunities conferred by the International Organizations Immunities Act.

SEC. 4. Executive Order No. 11718 of May 14, 1973, is revoked.

SEC. 5. This Order shall be effective as of November 24, 1976.

GERALD R. FORD

THE WHITE HOUSE,
January 19, 1977.

APPENDIX C

[Selected Excerpts]

Executive Order 12046 March 27, 1978

Relating to the Transfer of Telecommunications Functions

By virtue of the authority vested in me by the Constitution and laws of the United States of America, including Section 7 of Reorganization Plan No. 1 of 1977 (42 FR 56101 (October 21, 1977)), the authority and control vested in the President by Section 2 of Executive Order No. 11556, as amended, Section 202 of the Budget and Accounting Procedures Act of 1950 (31 U.S.C. 581c), and Section 301 of Title 3 of the United States Code, and as President of the United States of America, in order to provide for the transfer of certain telecommunications functions, it is hereby ordered as follows:

* * * *

SECTION 2

FUNCTIONS TRANSFERRED TO COMMERCE

2-1. *Radio Frequencies.*

2-101. The authority of the President to assign frequencies to radio stations or to classes of radio stations belonging to and operated by the United States, including the authority to amend, modify, or revoke such assignments, was transferred to the Secretary of Commerce.

2-102. This authority, which was originally vested in the President by Section 305(a) of the Communications Act of 1934, as amended (47 U.S.C. 305(a)), was transferred and assigned to the Director of the Office of Telecommunications Policy by Section 1 of Reorganization Plan No. 1 of 1970 and Section 3 of Executive Order No. 11556.

2-103. The authority to assign frequencies to radio stations is subject to the authority to dispose of appeals from frequency assignments as set forth in Section 3-2 of this Order.

2-2. *Construction of Radio Stations.*

2-201. The authority to authorize a foreign government to construct and operate a radio station at the seat of government of the United States was transferred to the Secretary of Commerce. Authorization for the construction and operation of a radio station pursuant to this authority and the assignment of a frequency for its use can be made only upon recommendation of the Secretary of State and after consultation with the Attorney General and the Chairman of the Federal Communications Commission.

2-202. This authority, which was originally vested in the President by Section 305(d) of the Communications Act of 1934, as amended (47 U.S.C. 305), was delegated to the Director of the Office of Telecommunications Policy by Section 5 of Executive Order No. 11556.

2-3. *Communications Satellite System.*

2-301. Certain functions relating to the communications satellite system were transferred to the Secretary of Commerce. Those functions were delegated or assigned to the Director of the Office of Telecommunications Policy by Executive Order No. 11191, as amended by Executive Order 11556. The functions include authority vested in the President by Section 201(a) of the Communications Satellite Act of 1962 (76 Stat. 421, 47 U.S.C. 721(a)). These functions are specifically set forth in the following provisions of this Section.

(a) Aid in the planning and development of the commercial communications satellite system and aid in the execution of a national program for the operation of such a system.

(b) Conduct a continuous review of all phases of the development and operation of such system, including the activities of the Corporation.

(c) Coordinate, in consultation with the Secretary of State, the activities of governmental agencies with responsibilities in the field of telecommunications, so as to insure that there is full and effective compliance at all times with the policies set forth in the Act.

(d) Make recommendations to the President and others as appropriate, with respect to all steps necessary to insure the availability and appropriate utilization of the communications satellite system for general government purposes in consonance with Section 201(a)(6) of the Act.

(e) Help attain coordinated and efficient use of the electromagnetic spectrum and the technical compatibility of the communications satellite system with existing communications facilities both in the United States and abroad.

(f) Assist in the preparation of Presidential action documents for consideration by the President as may be appropriate under Section 201(a) of the Act, make necessary recommendations to the President in connection therewith, and keep the President currently informed with respect to the carrying out of the Act.

(g) Serve as the chief point of liaison between the President and the Corporation.

(h) The Secretary of Commerce shall timely submit to the President each year the report (including evaluations and recommendations) provided for in Section 404(a) of the Act (47 U.S.C. 744(a)).

(i) The Secretary of Commerce shall coordinate the performance of these functions with the Secretary of State. The Corporation and other concerned Executive agencies shall provide the Secretary of Commerce with

such assistance, documents, and other cooperation as will enable the Secretary to carry out these functions.

2-4. *Other Telecommunications Functions.*

Certain functions assigned, subject to the authority and control of the President to the Director of the Office of Telecommunications Policy by Section 2 of Executive Order No. 11556 were transferred to the Secretary of Commerce. These functions, subject to the authority and control of the President, are set forth in the following subsections.

2-401. The Secretary of Commerce shall serve as the President's principal adviser on telecommunications policies pertaining to the Nation's economic and technological advancement and to the regulation of the telecommunications industry.

2-402. The Secretary of Commerce shall advise the Director of the Office of Management and Budget on the development of policies relating to the procurement and management of Federal telecommunications systems.

2-403. The Secretary of Commerce shall conduct studies and evaluations concerning telecommunications research and development, and concerning the initiation, improvement, expansion, testing, operation, and use of Federal telecommunications systems. The Secretary shall advise appropriate agencies, including the Office of Management and Budget, of the recommendations which result from such studies and evaluations.

2-404. The Secretary of Commerce shall develop and set forth, in coordination with the Secretary of State and other interested agencies, plans, policies, and programs which relate to international telecommunications issues, conferences, and negotiations. The Secretary of Commerce shall coordinate economic, technical, operational and related preparations for United States participation in international telecommunications confer-

ences and negotiations. The Secretary shall provide advice and assistance to the Secretary of State on international telecommunications policies to strengthen the position and serve the best interests of the United States, in support of the Secretary of State's responsibility for the conduct of foreign affairs.

2-405. The Secretary of Commerce shall provide for the coordination of the telecommunications activities of the Executive Branch, and shall assist in the formulation of policies and standards for those activities, including but not limited to considerations of interoperability, privacy, security, spectrum use and emergency readiness.

2-406. The Secretary of Commerce shall develop and set forth telecommunications policies pertaining to the Nation's economic and technological advancement and to the regulation of the telecommunications industry.

2-407. The Secretary of Commerce shall ensure that the Executive Branch views on telecommunications matters are effectively presented to the Federal Communications Commission and, in coordination with the Director of the Office of Management and Budget, to the Congress.

2-408. The Secretary of Commerce shall establish policies concerning spectrum assignments and use by radio stations belonging to and operated by the United States. Agencies shall consult with the Secretary of Commerce to ensure that their conduct of telecommunications activities is consistent with those policies.

2-409. The Secretary of Commerce shall develop, in cooperation with the Federal Communications Commission, a comprehensive long-range plan for improved management of all electromagnetic spectrum resources.

2-410. The Secretary of Commerce shall conduct studies and make recommendations concerning the impact of the convergence of computer and communications technology.

2-411. The Secretary of Commerce shall coordinate Federal telecommunications assistance to State and local governments.

2-412. The Secretary of Commerce shall conduct and coordinate economic and technical analyses of telecommunications policies, activities, and opportunities in support of assigned responsibilities.

2-413. The Secretary of Commerce shall contract for studies and reports related to any aspect of assigned responsibilities.

2-414. The Secretary of Commerce shall participate with the National Security Council and the Director of the Office of Science and Technology Policy in carrying out their functions under Sections 4-1, 4-2, and 4-3 of this Order, and may perform specific staff services for them as requested.

2-5. *Consultation Responsibilities.*

2-501. The authority to establish coordinating committees, as assigned to the Director of the Office of Telecommunications Policy by Section 10 of Executive Order No. 11556, was transferred to the Secretary of Commerce.

2-502. As permitted by law, the Secretary of Commerce shall establish such interagency committees and working groups composed of representatives of interested agencies, and shall consult with such departments and agencies as may be necessary for the most effective performance of his functions. To the extent he deems it necessary to continue the Interdepartment Radio Advisory Committee, that Committee shall serve in an advisory capacity to the Secretary. As permitted by law, the Secretary also shall establish one or more telecommunications advisory committees composed of experts in the telecommunications area outside the Government.

* * * *

SECTION 5

Related Telecommunications Functions

5-1. *The Department of Commerce.*

5-101. The Secretary of Commerce shall continue to perform the following functions previously assigned by Section 13 of Executive Order No. 11556:

(a) Perform analysis, engineering, and administrative functions, including the maintenance of necessary files and data bases, as necessary in the performance of assigned responsibilities for the management of electromagnetic spectrum.

(b) Conduct research and analysis of electromagnetic propagation, radio systems characteristics, and operating techniques affecting the utilization of the electromagnetic spectrum in coordination with specialized, related research and analysis performed by other Federal agencies in their areas of responsibility.

(c) Conduct research and analysis in the general field of telecommunications sciences in support of assigned functions and in support of other Government agencies.

5-102. The Secretary of Commerce shall participate, as appropriate, in evaluating the capability of telecommunications resources, in recommending remedial actions, and in developing policy options.

5-2. *Department of State.*

5-201. With respect to telecommunications, the Secretary of State shall exercise primary authority for the conduct of foreign policy, including the determination of United States positions and the conduct of United States participation in negotiations with foreign governments and international bodies. In exercising this responsibility the Secretary of State shall coordinate with other agencies as appropriate, and, in particular, shall give full consideration to the Federal Communications Com-

mission's regulatory and policy responsibility in this area.

5-202. The Secretary of State shall continue to perform the following functions previously assigned by Executive Order No. 11191, as amended:

(a) Exercise the supervision provided for in Section 201(a)(4) of the Communications Satellite Act of 1962, as amended (47 U.S.C. 721(a)(4)); be responsible, although the Secretary of Commerce is the chief point of liaison, for instructing the Communications Satellite Corporation in its role as the designated United States representative to the International Telecommunications Satellite Organization; and direct the foreign relations of the United States with respect to actions under the Communications Satellite Act of 1962, as amended.

(b) Coordinate, in accordance with the applicable interagency agreements, the performance of these functions with the Secretary of Commerce, the Federal Communications Commission, other concerned Executive agencies, and the Communications Satellite Corporation (see 47 U.S.C. 731-735). The Corporation and other concerned Executive agencies shall provide the Secretary of State with such assistance, documents, and other cooperation as will enable the Secretary to carry out these functions.

5-3. *General Services Administration.* The Administrator of General Services shall coordinate with the Secretary of Commerce, the Director of the Office of Science and Technology Policy, and the National Security Council the development of policies, plans, programs, and standards for the emergency use of telecommunications.

* * * *

6-304. This Order shall be effective March 26, 1978.

JIMMY CARTER

THE WHITE HOUSE,
March 27, 1978.

APPENDIX D

Executive Order 11191

PROVIDING FOR THE CARRYING OUT OF CERTAIN PROVISIONS OF THE COMMUNICATIONS SATELLITE ACT OF 1962

By virtue of the authority vested in me by Section 301 of title 3 of the United States Code, and as President of the United States, it is hereby ordered as follows:

SECTION 1. Definitions. As used in this order:

(a) The term "the Act" means the Communications Satellite Act of 1962 (76 Stat. 419), and includes, except as may for any reason be inappropriate, that Act as amended from time to time.

(b) The term "the Corporation" means the Communications Satellite Corporation (incorporated on February 1, 1963, under title III of the Act and under the District of Columbia Business Corporation Act).

(c) The term "the Director" means the Director of Telecommunications Management provided for in Executive Order No. 10995 of February 16, 1962.

(d) The term "the Secretary" means the Secretary of State or his designees.

SEC. 2. *Director of Telecommunications Management.* (a) Subject to the provisions of this order, the Director shall generally advise and assist the President in connection with the functions conferred upon the President by the provisions of Section 201(a) of the Act.

(b) The Director shall:

(1) Aid in the planning and development, and aid in fostering the execution, of a national program for the establishment and operation, as expeditiously as possible, of a commercial communications satellite system.

(2) Conduct a continuous review of all phases of the development and operation of such a system, including the activities of the Corporation.

(3) Coordinate the activities of governmental agencies with responsibilities in the field of telecommunication, so as to insure that there is full and effective compliance at all times with the policies set forth in the Act.

(4) Make recommendations to the President and others as appropriate, with respect to all steps necessary to insure the availability and appropriate utilization of the communications satellite system for general Government purposes in consonance with Section 201(a)(6) of the Act.

(5) Help attain coordinated and efficient use of the electromagnetic spectrum and the technical compatibility of the communications satellite system with existing communications facilities both in the United States and abroad.

(6) Prepare, for consideration by the President, such Presidential action documents as may be appropriate under Section 201(a) of the Act, make necessary recommendations to the President in connection therewith, and keep the President currently informed with respect to the carrying out of the Act.

(7) Serve as the chief point of liaison between the President and the Corporation.

SEC. 3. *Secretary of State.* (a) The Secretary shall exercise the supervision provided for in Section 201(a)(4) of the Act and, in consonance with Section 201(a)(5) of the Act, shall further timely arrangements for foreign participation in the establishment and use of a communications satellite system.

(b) The Secretary shall have direction of the foreign relations of the United States with respect to the Act, including all negotiations by the United States with foreign

governments or with international bodies in connection with the Act.

SEC. 4. *Annual reports.* The Director shall timely submit to the President each year the report (including evaluations and recommendations) provided for in Section 404(a) of the Act.

SEC 5. *Assistance and Cooperation.* The Director and the Secretary shall effect such mutual coordination, and all other federal agencies concerned, and the Corporation, shall furnish the Director and the Secretary such assistance and documents, and shall otherwise extend to them such cooperation, as will enable the Director and the Secretary properly to carry out their responsibilities under this order and best promote the implementation of the Act in an orderly and expeditious manner. In connection with his responsibilities under section 3 of this order, the Secretary shall consult with the Director and other federal officers concerned, and, as may be appropriate, with the Corporation.

SEC. 6. *Functions reserved.* The functions, or parts of functions, conferred upon the President by the Act that are not assigned herein are reserved to the President.

LYNDON B. JOHNSON

THE WHITE HOUSE,
January 4, 1965.

APPENDIX E

Procedures for U.S. Government Instruction of the Communications Satellite Corporation in its Role as U.S. Representative to the Interim Communications Satellite Committee

Introduction

The world system for communication by satellite is organized in a unique manner. The space segment of this system is owned and controlled by a consortium of more than 50 countries whose governing Board is the Interim Communications Satellite Committee (ICSC). The Communications Satellite Corporation (Comsat) is the owner of the largest share of the consortium, is the U.S. representative to the ICSC, and in turn acts as manager in the development and operation of the space segment. It is also, of course, a domestic U.S. corporation with certain functions having little or nothing to do with the work of the ICSC.

This document deals only with the problem of the supervision of the U.S. Government over Comsat in its role as U.S. representative to the ICSC, and as a member of the international consortium. In these roles, Comsat exercises, of course, among other things, an important foreign policy function on behalf of the U.S. Government. In some respects its role is similar to the role of other U.S. delegates to international bodies. Specific statutory responsibility for the supervision of Comsat in this role is provided in the Communications Satellite Act of 1962, and particularly Section 201 thereof. That Section imposes responsibilities both on the President and on the Federal Communications Commission (FCC). The President in turn has delegated some of his responsibility to the Director of Telecommunications Management and to the Secretary of State.

The supervision by the various agencies of the U.S. Government should be accomplished essentially by in-

structing Comsat on its course of action in the ICSC and consortium on those items where the U.S. has a statutory or general foreign policy interest. The manner in which these instructions are formulated and conveyed to Comsat is itself a critical policy matter.

The following procedures take into account the above considerations and provide a method by which the various agencies of the U.S. Government can, in a coordinated manner, participate in giving appropriate instructions to Comsat in its role as U.S. representative to the ICSC, consistent with the President's overall responsibility for the conduct of foreign affairs. This document is not concerned with the discharge of the statutory responsibilities of the particular government agencies involved, other than in the determination and issuance of instructions to Comsat.

(1) Comsat shall circulate copies of proposed agenda for meetings of the ICSC to the Department of State, the Director of Telecommunications Management, and the Federal Communications Commission at least four weeks before the matters on the agenda are to be considered by the ICSC. Amendments to agenda shall be circulated as soon as possible.

(2) Each of the agencies shall review the agenda promptly and advise the Department of State of those items on which it believes prior U.S. Government instructions to Comsat are required. The Department shall instruct Comsat that it shall not take action on such agenda items until it receives U.S. Government instructions. As to such items, Comsat shall furnish pertinent documentation as soon as possible.

(3) On important matters Comsat should advise the Department of State, the Director of Telecommu-

nications Management (DTM), and the FCC of the position it desires to take well before the time such matters are placed on the agenda and as soon as meaningful consideration can be given by the agencies, so as to allow inter-agency consultation in arriving at a determination of instructions to Comsat.

Comsat shall be advised that, where consideration by the FCC is required, its submission to the FCC shall be in such form, and with sufficient supporting data, so that the U.S. Government instructions may provide the flexibility required in discussions in the ICSC, without need for additional instructions on minor changes.

(4) The U.S. Government shall exercise its responsibility to instruct the U.S. representative in an expeditious and, ordinarily, non-public manner. This requirement raises particular considerations with respect to the FCC, in view of its obligations under 201(c) of the Communications Satellite Act of 1962, and its position as a regulatory agency. However, the FCC, under applicable statutory provisions, is able to operate in an expeditious and non-public manner with regard to its determinations concerning instructions to Comsat as the U.S. representative to the ICSC.

(5) Nevertheless, from time to time, the FCC, after consultation with the Department of State and the DTM, may find it appropriate and desirable to arrive at its determinations by means of a public hearing.

(6) On matters where consideration by the FCC is required, the FCC, after having followed either procedure, shall then request the Department of State to issue appropriate instructions to Comsat.

Otherwise, each agency, including the FCC, shall, as promptly as possible, advise the Department of State of its determinations with respect to items of interest to it.

(7) On receipt of the advice of the several agencies, the Department of State, in conformance with Section 201 of the Communications Satellite Act and Executive Order 11191, will issue instructions to Comsat as to the position it should take on the agenda items, taking into account the respective agency determinations.

APPENDIX F

MEMORANDUM OF UNDERSTANDING

Consistent with and in furtherance of the Communications Satellite Act of 1962, as amended, and Executive Order 12046, the Federal Communications Commission, the National Telecommunications and Information Administration of the Department of Commerce, and the Department of State (hereinafter referred to collectively as the "Government") welcome the efforts to date of the Communications Satellite Corporation (Comsat) to make INTELSAT materials and information more readily available and to increase public input into the INTELSAT decisionmaking process. The Government and Comsat now have in effect the following procedures:

1. Comsat will make available, upon request from any interested party, a detailed overview of INTELSAT's structure and activities including its procurement process, the workings of the INTELSAT decisionmaking bodies, Comsat's role and functions as U.S. Signatory, and Comsat's document distribution program.

2. Comsat will hold public meetings on a quarterly basis, scheduled to be synchronous with INTELSAT Board of Governors meetings, to provide a forum for a review and discussion with all interested parties of actions taken at the previous Board of Governors meeting, and proposals and action expected at the next such meeting. Comsat will provide the FCC with taped records of these public meetings, and the FCC will place the tapes in its public document room.

3. Comsat will continue to make available to the Government copies of all INTELSAT Board of Governors, Meeting of Signatories and Signatory documents as soon as Comsat receives them. The FCC will place in its public document room for public inspection and duplication all such INTELSAT documents as soon as they are received, unless Comsat requests nondisclosure of any such

document pursuant to the criteria for nondisclosure established in the FCC's Comsat Corporate Structure Order of March 30, 1984. Simultaneous with such request to the FCC for nondisclosure, Comsat will notify NTIA and the Department of State of those documents it seeks to have withheld from the public. NTIA and the Department of State will take into account such requests until notified to its contrary by the FCC or Comsat, as each Government agency meets its obligations under the Freedom of Information Act, but will consider all other such documents as public information.

4. Comsat will designate a point of contact for public inquiries and will notify the Government of that person's name, title, address, and phone number, and upon request will provide such information to any interested party.

5. Comsat will continue to invite all U.S. internatinal service carriers to the annual INTELSAT Global Traffic Meeting. Such carriers will continue to receive copies of the Traffic Data Base, which represents the results of those meetings.

6. Comsat will continue to provide international carriers with the plans which INTELSAT proposes for consideration by the annual regional meetings of Operations Representatives and will continue to hold briefings with carriers before and after these meetings to discuss both the proposed and agreed plans.

7. The FCC will issue a public notice thirty days prior to each INTELSAT meeting inviting written comments from interested parties on any matters on the agenda of the next INTELSAT meeting. The Government will take such comments into consideration in formulating its instructions to Comsat, but will not be bound by such public comments.

8. The procedures established by this memorandum are intended to complement, not supplant, the processes

by which Comsat briefs the Government before and after INTELSAT meetings. The Department of State will continue to issue instructions prior to or during each INTELSAT meeting and Comsat agrees to be bound by such instructions.

9. The parties to this memorandum agree that future developments may require a reevaluation of the effectiveness of this initiative and the adoption of new or additional procedures, to ensure that the objectives set forth herein continue to be met. Such future developments may include a determination that the procedures established herein do not adequately respond to the needs of U.S. participants in a growing and more competitive international telecommunications environment. Under such circumstances, the Government and Comsat agree to initiate discussions as soon as such factors are known and to work towards improving, revising or refining the procedures adopted in this memorandum. In any event, such discussion will be held soon after the sixth month anniversary of the signing of this memorandum.

Agreed to by the undersigned on the 28th day of September 1984, in Washington, D.C.

/s/ David J. Markey
DAVID J. MARKEY
Assistant Secretary for
Communications and
Information
National Telecommunications
and Information
Administration
U.S. Department of Commerce

/s/ Mark S. Fowler
MARK S. FOWLER
Chairman
Federal Communications
Commission

/s/ William Schneider, Jr.
WILLIAM SCHNEIDER, JR.
Under Secretary for Security
Assistance, Science and
Technology
U.S. Department of State

/s/ Irving Goldstein
IRVING GOLDSTEIN
President
Communications Satellite
Corporation

APPENDIX G

[SEAL]

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

November 28, 1984

Honorable Mark S. Fowler
Chairman
Federal Communications Commission
Washington, D.C. 20554

Dear Mr. Chairman:

The President has determined that separate international communications satellite systems are required in the national interest. He has also directed that we inform the Federal Communications Commission of criteria necessary to ensure the United States meets its international obligations and to further its telecommunications and foreign policy interests. Prior to final authorization by the Commission of any systems, to assure that the United States meets its obligations as a Party to the Agreement Establishing the International Telecommunications Satellite Organization (INTELSAT) (TIAS 7532):

(1) each system is to be restricted to providing services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public-switched message networks (except for emergency restoration service); and,

(2) one or more foreign authorities are to authorize use of each system and enter into consultation procedures with the United States Party under Article XIV(d) of the INTELSAT Agreement to ensure

technical compatibility and to avoid significant economic harm.

The President's determination, its conditions, and these criteria are premised on our review of the issues prompted by the applications now before the Commission. If proposals substantially different are forthcoming, further Executive Branch review may be required.

The Commission should afford interested parties an opportunity to submit timely comments on the pending applications in view of these Executive Branch recommendations.

A memorandum of law concerning Article XIV of the INTELSAT Agreement is enclosed.

Sincerely,

/s/ George P. Shultz
Secretary of State

/s/ Malcolm Baldrige
Secretary of Commerce

Enclosure

APPENDIX H

PUBLIC LAW 99-93 [H.R. 2068]; August 16, 1985

FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEARS 1986 AND 1987

An Act to authorize appropriations for fiscal years 1986 and 1987 for the Department of State, the United States Information Agency, the Board for International Broadcasting, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Foreign Relations Authorization Act, Fiscal Years 1986 and 1987".

* * * *

SEC. 146. INTELSAT.

(a) POLICY.—The Congress declares that it is the policy of the United States—

(1) as a party to the International Telecommunications Satellite Organization (hereinafter in this section referred to as "Intelsat"), to foster and support the global commercial communications satellite system owned and operated by Intelsat;

(2) to make available to consumers a variety of communications satellite services utilizing the space segment facilities of Intelsat and any additional such facilities which are found to be in the national interest and which—

(A) are technically compatible with the use of the radio frequency spectrum and orbital

space by the existing or planned Intelsat space segment, and

(B) avoid significant economic harm to the global system of Intelsat; and

(3) to authorize use and operation of any additional space segment facilities only if the obligations of the United States under article XIV(d) of the Intelsat Agreement have been met.

(b) PRECONDITIONS FOR INTELSAT CONSULTATION.—Before consulting with Intelsat for purposes of coordination of any separate international telecommunications satellite system under article XIV(d) of the Intelsat Agreement, the Secretary of State shall—

(1) in coordination with the Secretary of Commerce, ensure that any proposed separate international satellite telecommunications system comply with the Executive Branch conditions established pursuant to the Presidential Determination No. 85-2; and

(2) ensure that one or more foreign authorities have authorized the use of such system consistent with such conditions.

(c) AMENDMENT OF INTELSAT AGREEMENT.—(1) The Secretary of State shall consult with the United States signatory to Intelsat and the Secretary of Commerce regarding the appropriate scope and character of a modification to article V(d) of the Intelsat Agreement which would permit Intelsat to establish cost-based rates for individual traffic routes, as exceptional circumstances warrant, paying particular attention to the need for avoiding significant economic harm to the global system of Intelsat as well as United States national and foreign policy interests.

(2)(A) To ensure that rates established by Intelsat for such routes are cost-based, the Secretary of State, in

consultation with the Secretary of Commerce and the Chairman of the Federal Communications Commission, shall instruct the United States signatory to Intelsat to ensure that sufficient documentation, including documentation regarding revenues and costs, is provided by Intelsat so as to verify that such rates are in fact cost-based.

(B) To the maximum extent possible, such documentation will be made available to interested parties on a timely basis.

(3) Pursuant to the consultation under paragraph (1) and taking the steps prescribed in paragraph (2) to provide documentation, the United States shall support an appropriate modification to article V(d) of the Intelsat Agreement to accomplish the purpose described in paragraph (1).

(d) CONGRESSIONAL CONSULTATION.—In the event that, after United States consultation with Intelsat for the purposes of coordination under article XIV(d) of the Intelsat Agreement for the establishment of a separate international telecommunications satellite system, the Assembly of Parties of Intelsat fails to recommend such a separate system, and the President determines to pursue the establishment of a separate system notwithstanding the Assembly's failure to approve such system, the Secretary of State, after consultation with the Secretary of Commerce, shall submit to the Congress a detailed report which shall set forth—

(1) the foreign policy reasons for the President's determination, and

(2) a plan for minimizing any negative effects of the President's action on Intelsat and on United States foreign policy interests.

(e) NOTIFICATION TO FEDERAL COMMUNICATIONS COMMISSION.—In the event the Secretary of State submits a report under subsection (d), the Secretary, 60 calendar

days after the receipt by the Congress of such report, shall notify the Federal Communications Commission as to whether the United States obligations under article XIV (d) of the Intelstate Agreement have been met.

(f) IMPLEMENTATION.—In implementing the provisions of this section, the Secretary of State shall act in accordance with Executive order 12046.

(g) DEFINITION.—For the purposes of this section, the term "separate international telecommunications satellite system" or "separate system" means a system of one or more telecommunications satellites separate from the Intelsat space segment which is established to provide international telecommunications services between points within the United States and points outside the United States, except that such term shall not include any satellite or system of satellites established—

(1) primarily for domestic telecommunications purposes and which incidentally provides services on an ancillary basis to points outside the jurisdiction of the United States but within the western hemisphere, or

(2) solely for unique governmental purposes.

* * * *

APPENDIX I

[Selected Excerpts]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CC Docket No. 84-1299

IN THE MATTER OF
ESTABLISHMENT OF SATELLITE SYSTEMS
PROVIDING INTERNATIONAL COMMUNICATIONS

REPORT AND ORDER

Adopted July 25, 1985 Released September 3, 1985

By the Commission:

Commissioner Rivera issuing a separate statement; Commissioner Quello concurring and issuing a separate statement.

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II. *Introduction*

1. On January 4, 1985, we initiated an inquiry and rulemaking about the construction and operation of satellite systems providing international communications systems.[1] The purpose of this proceeding was to solicit data and analyses about issues that have arisen in connection with the filing of a series of applications for authority to establish international communications satellite systems separate from INTELSAT and to obtain comments on the recent Executive branch decision that such systems are "required in the national interest" subject to certain limitations.

2. Applications were filed by the Orion Satellite Corporation ("Orion"), File No. CSS-83-002-P, on March 11, 1983; by International Satellite, Inc. ("ISI"), File nos. CSS-83-004-P(LA), I-P-C-83-073, on August 12, 1983; by RCA American Communications, Inc. ("RCA"), File No. I-T-C-84-085, on February 13, 1984; by Cygnus Satellite Corporation ("Cygnus"), File No. CSS-84-002-P(LA), on March 7, 1984; and by Pan American Satellite Corporation ("PanAmSat"), File No. CSS-84-004-P(LA), on May 31, 1984.[2] After the initiation of this proceeding,

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[1] 50 Fed. Reg. 1570 (1985). Comments were originally due on February 14, 1985. By *Order*, 50 Fed. Reg. 4711 (1985), the Chief Common Carrier Bureau, extended the deadline for comments to April 1, 1985 and reply comments to June 5, 1985.

[2] Systematics General Corporation filed two applications to construct, launch, and operate satellite systems providing international

Financial Satellite Corporation ("FINANSAT"), File No. CSS-85-004-P(LA), filed an application on May 17, 1985.

3. In our Notice of Inquiry and Proposed Rulemaking, we asked for comments on the potential public benefits of authorizing separate systems, and on the economic impact separate systems would have on INTELSAT and their effect on consumers, service providers and equipment manufacturers. In addition, we requested comments on legal, technical and other policy issues and on those U.S. international obligations that must be taken into account in considering the applications before us. Finally, we requested comments on the scope and applicability of the Executive branch service restrictions intended to avoid significant economic harm to INTELSAT.

III. *Summary*

4. In this proceeding, we establish regulatory policies to consider applications for satellite systems providing international communications services separate from INTELSAT. We find here that the authorization of these separate satellite systems according to the Executive branch restrictions will be in the public interest. In arriving at this determination, we consider, first, the potential

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services (File Nos. CSS-84-005-P(LA), CSS-84-006-P(LA)) on June 12, 1984. On July 27, 1984, Systematics filed a motion to withdraw both applications. Under delegated authority, the Commission dismissed the applications without prejudice by letter dated August 6, 1984 pursuant to § 1.748(a) of the Commission's Rules and Regulations, 47 C.F.R. § 1.748(a) (1984). In addition, Western Union Telegraph Co. requested, and was granted, a waiver to spend additional money to modify its previously authorized WESTAR VI-S domestic satellite (File No. 1144-DSS-P/LA-84) to allow six transponders to provide coverage of Central and South America. Letter from Chief, Domestic Facilities Division, Common Carrier Bureau, to Robert N. Green, Associate Counsel, Western Union Telegraph Company (July 20, 1984). It has an application on file, File Nos. 1144-DSS-P/LA-84; I-T-C-85-039, which is currently being considered by the Commission.

public benefits alternative satellites may introduce in the international marketplace. In that section, we look at the current structure of both the domestic and international satellite markets and determine whether the competitive benefits claimed in the proposals for these systems would be a likely result of their entry. Next, we consider the scope, applicability, and enforceability of the Executive Branch restrictions designed to avoid causing significant economic harm to the INTELSAT system. In that area, we address the definition of public-switched network and whether the sale or long term lease restriction will effect the services the satellite operators will be able to offer. Third, we look at the concept of significant economic harm in Article XIV(d) of the INTELSAT Agreement and the potential impact of the entry of separate satellite systems into a limited segment of the segment of the international communications market on INTELSAT. Fourth, we consider a number of related issues which were raised in the record and could effect the authorization of these systems. Finally, we consider the necessary legal, technical, and financial qualifications to be a satellite systems operator.

5. We find that the separate satellite systems will provide substantial benefits to the users of international communications services without causing significant economic harm to INTELSAT. We also find it necessary to impose the Executive branch restrictions on the authorization of these systems in order to meet our international obligations under the INTELSAT Agreement. As to the scope and applicability of the Executive Branch restrictions, we find that: 1) no communications provided over the separate systems may interconnect with the public-switched network either directly or indirectly; 2) there will be no minimum unit of capacity; 3) there will be a one-year minimum lease period; 4) separate systems operators are not to operate as common carriers; 5) the "no-interconnect" restrictions and one-year long-term lease requirement will apply to all levels of users of separate sys-

tem facilities; 6) common carriers and enhanced service providers may resell separate satellite capacity consistent with the restrictions; and 7) the use of separate systems by United States carriers would require authorization under Section 214 of the Communications Act of 1934. We also find that because of inherent detectability and disincentives and our commitment to take forceful remedial action, the restrictions would be enforceable. In addition, we conclude that the entry of these systems in a limited area of the international market will not cause significant economic harm to INTELSAT. INTELSAT will remain the exclusive provider of satellite facilities for public-switched message services and already has a start in providing the services which the separate satellite systems would compete. INTELSAT may lose a small part of its business in this market to new entrants, but we conclude that growing demand for satellite services will more than compensate for a smaller market share. We also conclude that none of the related issues raised will preclude or delay the authorization of these systems. Finally, in this order, we set out the specific details of the legal, financial, and technical qualifications necessary to obtain authority to construct and operate separate satellite systems.

* * * *

(E) *Summary of Conclusions*

265. In this proceeding, we have considered a variety of issues that have been raised by the applications that have been filed with the Commission to construct and operate international communications satellite systems separate from INTELSAT. We have concluded that the proposed separate systems will offer substantial benefits to international communications users. Separate systems will provide users with special communicaitons needs with currently unavailable means of packaging and transmitting information over satellite networks. Separate Sys-

tems will also stimulate technological innovation and service development, improve network efficiencies, reduce user costs, create new business and trade opportunities through improved international communications. Further, we have concluded that authorization of the proposed separate systems subject to the Executive branch service restrictions will provide reasonable assurance that INTELSAT will not incur significant economic harm. These service restrictions will protect INTELSAT's revenues obtained from supplying space segment capacity for international switched message services by prohibiting separate systems from interconnecting with public-switched networks. Public-switched services by far comprise INTELSAT's largest source of revenues. Only peripheral or "customized" services would be subject to competition between INTELSAT and separate systems. We believe that entry will stimulate the overall international satellite communications market beyond the levels anticipated by INTELSAT and that INTELSAT stands to benefit from such expansion. Entry of competing suppliers also will put pressures on INTELSAT to improve the efficiencies of its operations and provide services at minimum costs, consistent with reasonable service standards.

266. To implement the Executive branch service restrictions, we will condition the license for any separate system that we authorize to limit its operation to the provision of services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public-switched message networks (except for emergency restoration service). No communications provided over a separate satellite sytem's space segment may interconnect with the public facilities of common carriers to provide switched message services such as MTS, telex, TWX, telegraph, teletext facsimile and high speed switched data services. The "no-interconnection" and "sale and long-term lease" restrictions apply not only to separate system operators, but also to all levels of resellers and users of the facilities. In

view of the "sale and long-term lease" requirement, separate system licensees may not operate as common carriers. Finally, we have determined the following: (1) there is no need to establish a minimum unit of space segment capacity which a separate system must provide; (2) the minimum lease period for the "long-term lease" of capacity is to be one year; (3) space segment capacity may be obtained and resold by common carriers and enhanced service providers to provide communications services not interconnected with any public-switched message network; and (4) there is no basis to establish a "sunset" date for the Executive branch service restrictions absent a finding from the Executive branch that these restrictions are no longer necessary to fulfill U.S. international obligations.

267. In addition, consistent with the Presidential determination that separate systems are required in the national interest, we will not issue a license permitting any separate system applicant to begin operating its proposed system until the United States has completed coordination of that ssytem with INTELSAT pursuant to Article XIV (d) of the INTELSAT Agreement and we have been informed by the Department of State that the United States has fulfilled its obligations under Article XIV(d). We will review applications to determine whether the proposals: (1) are consistent with the Executive branch service restrictions and the spectrum/orbit efficiency standards that we are adopting in this decision; (2) satisfy requisite legal, financial and technical standards; and (3) otherwise are in the public interest under the Communications Act of 1934. We will issue initial construction permits to those applicants initially satisfying legal, technical and minimum financial standards. However, no applicant may begin construction until it satisfies all financial standards. Those standards must be satisfied no later than 60 days after the State Department informs the Commission that the U.S. has fulfilled its Article XIV(d) obligations. An applicant meeting all legal, technical and financial standards prior to completion of the Article XIV(d) process

may begin construction upon Commission order and at its own risk. However, no license will be issued until Article XIV(d) consultation is completed and the applicant demonstrates that it has completed construction pursuant to the terms of its construction permit.

268. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 157, 303, 308, 309, 403 and 404 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i)(j), 157, 303, 308, 309, 403 and 404 (1984), Sections 102(d), 201(c)(3), (4), (9), and (11) of the Communications Satellite Act of 1962, as amended, 47 U.S.C. §§ 701(d), 721(c)(3), (4), (9), (11) (1984), Section 553(b) of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1984), and Sections 1.412 and 1.430 of the Commission's Rules and Regulations, 47 C.F.R. §§ 1.412, 1.430 (1984), that applications for international communications satellite systems separate from INTELSAT SHALL BE SUBMITTED in accordance with the standards, restrictions and requirements specified in this decision.

269. IT IS FURTHER ORDERED that this Report and Order is immediately effective on release of this document since it serves to relieve restrictions on separate satellite systems providing international communication services. To the extent this Report and Order imposes additional requirements, the applicants are granted 45 days in which to file amendments so that their applications comply with the requirements, unless a different schedule has been otherwise set out in the Report and Order. See 5 U.S.C. § 533(d) (1984); 47 C.F.R. § 1.427(b) (1984).

270. IT IS FURTHER ORDERED that Amb. Abbott Washburn's Petition for Leave to File Additional Comments is DENIED.

271. IT IS FURTHER ORDERED that International Satellite, Inc.'s Application for Review, filed on February 11, 1985, and Pan American Satellite Corporation's Motion

to Re-Establish Fair and Reasonable Procedural Dates, filed on February 4, 1985, are DENIED.

272. Pursuant to Section 605(b) of the Regulatory Flexibility Act (P.L. 96-354), IT IS CERTIFIED, that Sections 603 and 604 of the Act do not apply because this proposed rule or policy will not, if promulgated, have a significant economic impact on a substantial number of small entities. See 5 U.S.C. §§ 603, 604, 605(b) (1984). The policies adopted in this proceeding will not have a significant economic impact on a substantial number of small businesses or other small entities because the Commission has not received, and does not anticipate receiving, a substantial number of applications from small businesses for authority to construct and operate satellite systems providing international communications services.

273. IT IS FURTHER ORDERED that CC Docket No. 84-1299 IS HEREBY TERMINATED.

274. IT IS FURTHER ORDERED that the Secretary shall cause a summary of this Report and Order to be published in the Federal Register.[172]

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO
Secretary

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[172] We find that the summary of this Report and Order which will be published in the Federal Register will serve as effective notice to all parties under Section 553(d) of the Administrative Procedure Act, 5 U.S.C. § 553(d), and Section 1.427 of the Commission's Rules and Regulations. See 47 C.F.R. § 1.427.